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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Comments and observations received by Governments

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I. INTRODUCTION

1. On 16 December 1996, the General Assembly adopted resolution 51/160, entitled "Report of the International Law Commission on the work of its forty-eighth session". In paragraph 6 of that resolution, the Assembly encouraged Governments that might wish to do so to provide their comments and observations in writing on the report of the Working Group on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, annexed to the report of the International Law Commission,[1] in order that the Commission might, in the light of the report of the Working Group and such comments and observations as might be made by Governments and those that have been made in the Sixth Committee, consider at its forty-ninth session how to proceed with its work on the topic and make early recommendations thereon.

2. By a note dated 31 December 1996, the Secretary-General invited Governments to submit their comments pursuant to paragraph 6 of resolution 51/160.

3. As at 14 April 1997, a reply had been received from the United States of America, which is reproduced in section II below. Additional replies will be reproduced as addenda to the present report.

II. COMMENTS AND OBSERVATIONS RECEIVED BY GOVERNMENTS

UNITED STATES OF AMERICA

[Original: English]

[11 April 1997]

Introduction

1. In paragraph 6 of its resolution 50/160 of 16 December 1996, entitled "Report of the International Law Commission on the work of its forty-eighth session", the General Assembly encouraged Governments who might wish to do so to provide their comments and observations in writing on the report of the Working Group on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, in order to guide the Commission in its consideration at its forty-ninth session on how to proceed with its work on the topic.

2. The Government of the United States of America is pleased to provide the following comments and observations.

Overview

3. The International Law Commission has been considering this topic since 1978. The conceptual framework for the topic has varied greatly over the course of the work. The initial approach focused on devising a scheme imposing liability for actual injury or harm, emphasizing procedural obligations of

States; e.g., cooperation with regard to preventative measures, notification and negotiations for reparation in the event of harm.

4. During this period, consideration of the topic appeared to be based on the theory that States should only be liable for activities not prohibited by international law that caused or threatened to cause significant physical transboundary damage. Moreover, many International Law Commission members took the position that the activities covered should only include those widely recognized as being ultrahazardous.

5. Later approaches addressed the much broader concept of having liability flow from activities "that entail a risk of significant transboundary harm".

6. The reactions of States to this topic, as reflected in debates of the Sixth Committee, have varied widely in recent years. In 1996, the International Law Commission formed a Working Group to review the topic in all its aspects. The Working Group presented a report containing 22 draft articles, along with a commentary thereto.[1] The International Law Commission was not, however, able to examine the draft articles at its forty-eighth session in 1996.

7. The draft articles, presented as if to form the basis of a treaty, describe a very broad and ambitious regime. The 22 draft articles are divided into three chapters covering, respectively, "General provisions", "Prevention" and "Compensation and other relief".

8. Chapter I (articles 1-8) sets forth the basic parameters of the proposed regime and some of the fundamental obligations of States. The regime applies to all activities not prohibited by international law which involve a risk of significant transboundary harm (article 1 (a)). A bracketed proposal would extend the scope even further to include activities that entail no such risk but which nevertheless cause such harm (article 1 (b)).

9. Articles 3 and 4 obligate States to prevent or minimize such risk and, where harm occurs, to minimize its effects. Article 5 declares that "liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to compensation or other relief".

10. Chapter II (articles 9-19) sets forth certain obligations of States relating to the prevention of harm. In particular, a State must ensure that covered activities do not occur on their territories without prior authorization by that State, which could not be given before the State undertook an assessment of the risk of significant transboundary harm posed by the proposed activity (articles 9 and 10). Where the assessment indicates such a risk, the State must notify other States likely to be affected. Those States may require the "State of origin" to enter into consultations "with a view to achieving acceptable solutions" based on a set of "factors involved in an equitable balance of interests" (articles 17-19).

11. Chapter III (articles 20-22) outlines two distinct approaches for pursuing compensation or other relief in the event of significant transboundary harm. The first approach requires States of origin not to discriminate against persons who have suffered such harm and who seek relief within that State's judicial or

administrative systems (article 20). Article 20 does not, however, expressly appear to require States to allow such recourse in the first instance. The second approach requires the State of origin to enter into negotiations with other affected States, at their request, "on the nature and extent of compensation or other relief" (article 21), based on another set of "factors for negotiation" (article 22).

General comments

12. Although the draft articles are presented as if to form the basis of a binding instrument, the United States continues to believe that the work should be devoted to crafting non-binding guidelines or general principles. Agreements already in existence or under negotiation suggest a need for liability regimes closely tailored to the particular circumstances of the activity in question and the parties involved. The United States does not believe that it is feasible, or even necessarily desirable, to elaborate a single binding regime to cover all cases.

13. The general commentary to the draft articles provided by the Working Group begins with the assumption that:

> [t]he frequency with which activities permitted by international law, but having transboundary injurious consequences, are undertaken, together with scientific advances and greater appreciation of the extent of their injuries and ecological implications dictate the need for some international regulation in this area.

14. The United States believes that, while this is undoubtedly true, the "international regulation in this area" ought to proceed, as it has been proceeding, in careful negotiations concerned with particular topis (e.g., oil pollution, hazardous wastes and transboundary environmental impact assessments) or particular regions. Given the rapidly developing circumstances of these negotiations, the International Law Commission will be hard-pressed to elaborate anything on this topic beyond general principles of a non-binding nature.

15. In addition, the United States reiterates its concern that the work of the International Law Commission on this topic has steadily expanded in scope. The draft articles would obligate States to set up a permitting and environmental impact assessment process for virtually all activities, public or private, that could cause significant transboundary harm, and implies State liability for all such harm. This approach is unacceptable to the United States. In order to produce a useful document likely to command consensus, the International Law Commission should narrow the focus in a number of respects, as discussed below.

Comments on chapter I (articles 1-8)

16. As provided in article 1 (a), the scope of the present draft articles would apply to "activities not prohibited by international law which involve a risk of causing significant transboundary harm". The Working Group has specifically asked for views as to whether the scope be extended to cover other activities not prohibited by international law which do not entail a risk of causing significant transboundary harm but nonetheless cause such harm. The Working

Group also asked for views on whether article 1 should be supplemented by a list of activities or substances to which the articles apply or whether it should be confined, as it is now, to a general definition of activities.

17. In the view of the United States, article 1 (a) is already too broad and certainly should not be expanded as suggested. In the view of the United States, article 1 (a) should actually be narrowed to encompass only ultrahazardous or particularly hazardous activities. To impose liability (as article 5 does) for all legal activities which involve any risk of causing significant transboundary harm brings the scope of the topic to a virtually unmanageable level, one far beyond that currently recognized by customary international law or any existing convention.

18. To extend the regime even further, to encompass additional activities that do not entail any risk but nevertheless cause harm, is beyond contemplation.

19. If agreement is reach to limit the topic to ultrahazardous or particularly hazardous activities, as the United States proposes, it might be useful to develop a list of such activities, although any list developed should not purport to be exhaustive. New activities may occur in the future that deserve to be covered.

20. The United States would also like to raise a related concern. Article 1 (a) does not define or limit the term "activity". As such, all activities not prohibited by international law which involve a risk of causing significant transboundary harm would be covered. In theory, this could include the imposition of economic sanctions, even United Nations-mandated sanctions, or even other legitimate economic policies that States may implement. If this is not the intent, and the United States believes that it is not, then the International Law Commission should make it clearer that the scope of the draft articles is limited to physical harm only.

21. Article 5 asserts that "liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to compensation or other relief". The Working Group has noted that chapter III, dealing with the modalities for seeking compensation and other relief, have been drafted in a flexible manner and do not impose "categorical obligations". The Working Group has specifically sought comments on this approach.

22. The concerns of the United States with respect to the liability provisions of the draft articles relates more to article 5 itself than to the provisions of chapter III. As drafted, article 5 is both ambiguous and troubling. To say that "liability arises from significant transboundary harm" is to leave open the question of precisely who (or what) is liable. Are States liable in every such case? Are private entities ever liable? Are States and private entities ever jointly and severally liable?

23. Given that the draft articles are presented as if to form the basis of a treaty, one might assume that they seek to impose obligations only on States, not on private entities. The commentary to the draft articles does not shed useful light on this key question, instead stating that "the principle of

liability is without prejudice to the question of ... the entity that is liable and must make reparation".

24. The United States does not believe that, under customary international law, States are generally liable for significant transboundary harm caused by private entities acting on their territory or subject to their jurisdiction or control. From a policy point of view, a good argument exists that the best way to minimize such harm is to place liability on the person or entity that causes such harm, rather than on the State. Indeed, as the commentary itself observes, some specific regimes already in existence, such as the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, take this approach; others do not. The point is that the draft articles do nothing to advance the understanding of this central point and may in fact serve merely to confuse matters.

Comments on chapter II (articles 9-19)

25. Articles 9 and 10 together require States to prohibit the carrying out of any activity involving a risk of significant transboundary harm without prior governmental authorization, which must be preceded by an environmental risk assessment (including assessment of the risk of significant transboundary harm). These articles appear to be premised on the existence of "command and control" economies of the sort that have generally disappeared in favour of market-oriented economies, in which Governments exercise more limited regulatory control.

26. In short, few if any Governments could actually carry out the envisioned risk assessments for all covered activities that may be carried out by private actors on their territory or otherwise subject to their jurisdiction or control. A more feasible approach might be to require states only to conduct risk assessments for such activities carried out by the Governments themselves. Minimizing the risks posed by private activities could be addressed through domestic liability laws and private insurance programmes.

Comments on chapter III (articles 20-22)

27. With respect to chapter III, the United States endorses the principle articulated in article 20 that States should not discriminate in providing access to their judicial systems for those seeking relief from significant transboundary harm, although such access in the view of the United States need not be identical to access provided to individuals with claims of harm occurring in the State of origin. While article 20 clearly prohibits this kind of discrimination, the United States questions why it does not appear to require a State or origin in the first instance to provide access to those seeking relief from significant transboundary harm.

28. More generally, the United States endorses the flexible approach of article III, which contemplates the two avenues that are generally open to those seeking compensation or other relief in such situations (access to courts in the State of origin and State-to-State negotiations). In some circumstances, it may be most appropriate for victims of significant transboundary harm to seek redress through the judicial or administrative systems of the State of origin.

In other circumstances, particularly where the transboundary harm is widespread or is actually caused by an agent or instrumentality of a Government, State-to-State negotiations may be the best approach.

Notes

[1] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 and corrigendum (A/51/10 and Corr.1), annex I.